**PP**

**v.**

**SIVAKUMAR AMMASI**

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CRIMINAL CASE NO: 45-22-99]
20 FEBRUARY 2003

***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in heroin - Prima facie case - Allegation that accused involved in 'selling' dangerous drugs - Proof - Evidence adduced alluded to negotiation - No sale transaction concluded - Whether no prima facie case - Whether accused to be acquitted and discharged - Dangerous Drugs Act 1952, ss. 2, 37(d), (da)(i), 40A*

***EVIDENCE:*** *Exhibit - Trafficking in heroin - Break in chain of evidence - No evidence as to who labeled and packed drugs for delivery to chemist - Whether a serious gap - Whether fatal - Dangerous Drugs Act 1952, s. 39B(1)(a)*

The accused was charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in 161.49 grams of heroin. It was not in dispute that, in prosecuting the charge thus, the prosecution was relying on the alleged act of 'selling', as the term was defined in s. 2 of the Act, and not on the accused having been in custody or possession of the dangerous drugs as spelt out in ss. 37(d) or 37(da)(i) of the Act. This being the case, before the learned judge herein, at the end of the prosecution case, a question arose as to whether a *prima facie* case had been made out against the accused, considering that: (i) the evidence as adduced by the prosecution was only that an agent provocateur ('SP7') had negotiated to purchase from the accused some four pounds of heroin for RM22,000, and that the accused was arrested the moment he showed SP7 the drugs in question which was then lying in the accused's car; and (ii) there was a break in the chain of evidence in respect of the exhibits.

**Held:**

**[1]** The word 'selling' in s. 2 of the Act ought to be given a strict interpretation. On the facts, whilst there was evidence of negotiations, there was no evidence of selling. The offence of selling had clearly not been completed. Indeed, SP7 did not even have the money to conclude a sale. (p 169 a)

**[2]** There was no explanation as to the packages A, B, C tendered to the chemist. This is a chasmic void in the prosecution's case. How did the drugs get out of SP6's cabinet to be labeled as packages marked A, B and C. This gap in the prosecution's case is very serious and must be given sufficient consideration by the court. There is a doubt as to whether the exhibits actually sent to the chemist were the same exhibits that were said to have been safely secreted in the cloistered chambers of SP6's cabinet. (p 165 e-f)

**[3]** SP4 testified that he had arrested the accused and seized the exhibits on 16 October 98 at about 10.50pm, and thereafter handed over the exhibits to SP6 on 17 October 98 at about 1.55am. SP6 however said that he received the exhibits from SP4 at 1.30am. SP4 did not explain as to where the exhibits were, or who had custody of it from 10.50pm to the time he handed them to SP6. On this ground that there is a doubt as to the exhibits seized and, considering the break in the chain of evidence, this court has to acquit the accused. (pp 165 h & 166 a)

**[4]** Bearing in mind the decisions of the Supreme Court in *Chow Kok Keong v. PP* and *Ng Chai Kem v. PP*, the abject failure of the prosecution to decline to rely on the presumption section of the Act, and the evidence adduced, there is insufficient evidence for this court to call upon the defence based on the definition of s. 2 of the Act. (p 169 b)

*[Accused acquitted and discharged without defence called.]*

**Case(s) referred to:**
*Chow Kok Keong v. PP [1998] 2 CLJ 469 FC* ***(refd)***
*PP v. Lee Eng Kooi [1993] 2 MLJ 322* ***(dist)***
*PP v. Mohamed Musa Abdullah [2002] 1 CLJ 366 HC* ***(refd)***
*PP v. Tan Hock Beng [2002] 3 CLJ 177 HC* ***(refd)***
*R v. Abbott [1955] 2 All ER 899* ***(refd)***
*Teh Geok Hock v. PP [1989] 3 MLJ 162 SC* ***(refd)***
*Teoh Hoe Chye v. PP; Yeap Teong Team [1987] 1 CLJ 471 SC* ***(refd)***

**Legislation referred to:**
Criminal Procedure Code, s. 112
Dangerous Drugs Act 1952, ss. 2, 37(d), (da)(i), 37A(1)(b), 39B(1)(a), (2), 40A(2)
Evidence Act 1950, s. 32(1)(i)
Internal Security Act 1960, s. 57(1)(a), (b)

*For the prosection - Anuar Abd Rahman DPP*
*For the respondent - Ranjit Singh; M/s R Rajasingam & Co*

*Reported by WA Sharif*

## JUDGMENT

**RK Nathan J:**

The accused was charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') for trafficking in 161.49 grams of heroin and punishable with death under s. 39B(2) of the DDA. The offence was alleged to have been committed on 16 October 1998 at about 10.50pm in front of TNB Plaza, at Tol Juru, Bukit Tengah in the District of Seberang Perai Tengah, Pulau Pinang.

**Findings Of The Court**

The case began on 8 January 2001 before Selventhiranathan J who heard the evidence of the police photographer and another witness. The case was then continued before Hassan Lah, J who heard the evidence of the chemist. On 10 May 2002 parties agreed that I continue with the case rather than commencing it *de novo*.

On the day fixed for the continued hearing, Mr Ranjit Singh for the accused applied for a copy of Bukit Tengah Report No. 4243-44/98 being the first information report as stated in the charge sheet, to be supplied to him. The learned deputy public prosecutor objected on the basis that the report was lodged after investigations had commenced. Notwithstanding his objections he left it to the discretion of the court. Based on my earlier decision in *PP v. Mohamed Musa Abdullah* [2002] 1 CLJ 366 I directed the prosecution to release a copy of Bukit Tengah Report No. 4243-44-98 to the defence within 14 days from the date of my order.

**The Evidence Led**

The first witness called before me was SP4, Sup. (then DSP) Ramli Din. He testified that he seized a car Proton Wira No. PEC 3921 in relation to this case. According to this witness when Chief Insp Chang read the statutory warning to the accused, the accused looked frightened. He was taken to the rear of the said car where the caution was administered, and he maintained that at that material time the accused was not hand-cuffed. He then directed one Det Corp Richard Mahesan to act as the interpreter. After recording the cautioned statement of the accused, another cautioned statement was also

recorded from another male Indian named Gobinathan Subramaniam who was also in the car with the accused at the time of arrest, and who was seated in the front passenger seat. The second cautioned statement from Gobinathan was recorded by Chief Insp Sam Phan.

At this point of time the court was informed that on 8 January 2001 when this case commenced, the same charge that was preferred against the said Gobinathan was withdrawn and he had been discharged.

When the learned deputy public prosecutor intended to tender the accused's cautioned statement Mr Ranjit Singh objected and asked for a trial within a trial to determine the voluntariness of the said statement. The learned deputy public prosecutor left it to the court. I therefore directed a trial within a trial to be held to determine the voluntariness of the cautioned statement.

On the next day when the trial within a trial was to commence both counsel informed the court that since SP4 was leaving for England to attend a course, by consent it was agreed to cross-examine SP4 before the trial within a trial could commence.

Under cross-examination SP4 confirmed that the police moved against the accused based both on information received and also as a set project using an agent provocateur. He was the supervisor of this project. The agent provocateur or the detective assigned to a case would maintain what is called a detective's journal in which he would record all relevant matters of concern relating to the case which he would appraise his supervisor of. Whilst the accused was arrested at 10.50pm, at 2pm he had assigned Chief Insp Chang and one L/Corp to identify the suspect who would be pointed out by L/Corp Richard Mahesan at a coffee shop in Jalan Tien Teik. He also confirmed under cross-examination that he was informed that the agent provocateur and the suspect did not come face to face with each other. He also confirmed that the reason he directed the cautioned statements to be recorded from both the accused and Gobinathan was to ascertain the ownership of the drugs found at the foot rest of the passenger side of the seized car. He also confirmed that the cautioned statements were recorded within five minutes of the arrest of the accused and Gobinathan.

Under re-examination SP4 stated that when the accused arrived at the pre-designated place he raised his hand in greeting towards the agent provocateur as soon as he had stopped the car. The accused then alighted from the car and began talking with the agent provocateur. They both then walked towards the accused's motor car. At that moment he, SP4 shouted to arrest the accused.

He was sure that there was no face to face meeting between the accused and the agent provocateur before the arrest.

**Trial Within A Trial**

The first witness in the trial within a trial stage was Chief Insp Chang. He confirmed he was directed to help in an ambush that led to the arrest of the accused at Plaza Toll, Juru. He was also directed to record a cautioned statement from the accused. Before he commenced recording the cautioned statement he read the statutory caution pursuant to s. 37A(1)(b) of the Act and this was translated to the accused by Det Corp Richard Mahesan in the Tamil language. He was satisfied that the accused understood the Tamil language spoken because as Richard Mahesan was translating, the accused answered the former in Tamil. He confirmed that the accused was not handcuffed when the cautioned statement was recorde. He had recorded the cautioned statement on a piece of paper which he had rested on the rear boot of the car driven by the accused. At the time of recording the cautioned statement the accused looked frightened but he was able to talk. He offered no threat, promise or inducement to the accused before recording the cautioned statement and he was satisfied that the said statement was made voluntarily. After recording the cautioned statement he, the accused and Richard Mahesan signed the said cautioned statement. The said statement was then marked as ID17. Counsel for the defence then asked for another date to prepare his cross examination.

On the next date, the learned deputy public prosecutor informed the court that he wished to discontinue with the trial within a trial and indicated that he wished to proceed with the main trial. ID17 was therefore ruled no longer to be referred to and was expunged from the record.

The next witness for the prosecution was ASP Mohamad Ismail (SP6), the investigating officer of the case. Upon receiving a telephone call from DSP Ramli, he went to the Plaza Toll at Juru with a police photographer and took nine photographs of the scene. He then returned to the Police Station where he met DSP Ramli who handed him the exhibits after putting his own markers on the exhibits for purposes of identification. He received a plastic bag with the words Hameediayah Restaurant written on it. Inside the plastic bag he found two yellow envelopes. In each of the said two envelopes he found two clear plastic bags containing what was suspected to be heroin. He also received another clear plastic bag containing four Scottex tissue boxes which contained two packages wrapped in a Chinese newspaper. On unwrapping the newspaper he found two clear plastic bags containing what was suspected to be heroin. He was also handed the motor car No. PEL 3921 with its ignition key, a Star-

Tek brand hand-phone, an Erickson brand hand-phone, a purse containing cash RM1,000 and Rupiah 53,000, the two cautioned statements of the accused and Gobinathan, a search list, the identity cards of both the suspects, and the two suspects themselves. He then put his own markings on the exhibits with the date, and locked the exhibits except for the car, in his cabinet to which only he had access. He handed the exhibits to the chemist for analysis and received the same with the report after the analysis and he again locked the exhibits in the same cabinet. The owner of the car PEL 3921 was one Mariayee, a relative of the accused. After Gobinathan's release he did record a further statement from Gobinathan.

The learned deputy public prosecutor then applied to tender the statement recorded from Gobinathan, under s. 112 of the CPC pursuant to s. 32 of the Evidence Act 1950. SP6 informed the court that he had recorded a statement from Gobinathan Subramaniam. He had directed the police from Seberang Jaya Police station to look for Gobinathan at his house at Block A/04B Taman Siakap, Seberang Jaya. He was informed by the Police that when they went to the said address Gobinathan's sister had told the Police that he had not returned to the house since his release from prison. Subsequently he had been on many occasions to the said house and the last occasion being the day before he testified. On each occasion he was unable to meet with the said Gobinathan. He then produced his station diary in which he had entered all the occasions he had been to Gobinathan's house. In addition to this he had also caused a photograph of Gobinathan to appear in the Harian Metro newspapers on 2 November 2002 in which he had stated that Gobinathan Subramaniam was required to attend the High Court No. 4 at Penang to testify in this case. He had also requested for a similar publication in the Tamil newspapers but unfortunately it did not appear.

Under cross-examination whilst agreeing that he had received the two hand-phones, SP6 admitted he did not ascertain who the owners were of the said hand-phones. To a question he admitted having recorded a s. 112 CPC statement from one Izudin. The reason he had recorded this statement was because he wanted Izudin to be a witness for the prosecution, He however conceded that in that statement there was no mention of any buying and selling of drugs. He had investigated this case as a normal case arising out of information received and not on the basis of the use of an agent provocateur. By consent parties tendered Bukit Tengah Report 4243-44/98 (D23) minus the reference to a cautioned statement being recorded, since the learned deputy public prosecutor was not tendering the cautioned statement. SP6 confirmed that the said report made no reference to an agent provocateur nor to any buying or selling of

drugs. He also did not direct the lifting of any finger prints from the packages handed over to him by DSP Ramli. However under re-examination he testified that at the early stages he did not know if there was an agent provocateur involved. However subsequently he found out that Izudin was the agent provocateur.

After he had conducted the re-examination of SP6, the learned deputy public prosecutor then applied to recall SP6. Since counsel for the accused had no objections I allowed the said recall. Having been reaffirmed the learned deputy public prosecutor then applied to tender the statement of Gobinathan pursuant to s. 32(1) of the Evidence Act 1950. Since counsel for the accused objected, I heard submissions.

**Application Under Section 32(1) Of The Evidence Act 1950**

Whilst neither the prosecution nor the defence indicated the relevant subsection under which the statement recorded pursuant to s. 112 of the CPC was sought to be admitted, I assume it must be under sub-s. (i). The s. 32(1)(i) reads as follows:

> 32. (1)(i)when the statement was made in the course of, or for the purposes of, an investigation or inquiry into an offence under or by virtue of any written law;
>
> (2) The provisions of paragraphs (i) and (j) of subsection (1) shall apply only in relation to a criminal proceeding.

The learned deputy public prosecutor submitted that the prosecution had made many unsuccessful attempts to trace Gobinathan at his house. In fact the investigating officer of the case SP6 had himself personally been to Gobinathan's home and had talked to his sister. Besides the prosecution has also advertised in the newspapers. It was imperative that Gobinathan attends the trial to testify. Besides the police had also telephoned the Tamil newspapers to advertise the need for Gobinathan to attend the said trial. Based on all these efforts the prosecution sought to admit Gobinathan's statement under s. 32(1)(i) of the Evidence Act 1950.

Mr Ranjit on the other hand argued that the prosecution had to satisfy the court that Gobinathan could not be found or that his attendance could not be procurred without delay or expense. Having heard the evidence of SP6 on the attempts made to secure the attendance of Gobinathan to court to testify, it is my judgment that where no diligent search or reasonable attempts had been made to secure the attendance of such an important witness, this court cannot come to a finding that the witness could not be found. Gobinathan's statement was recorded on 8 January 2001 although Gobinathan and this accused were

arrested on 16 October 1998. However the earliest attempt to contact Gobinathan was made on 5 April 2002 according to SP6's evidence. Subsequently the second attempt was made on 5 November 2002 where according to SP6 he met Gobinathan's sister and requested her to inform Gobinathan to attend the Penang High Court No. 4.

What is most surprising is that no evidence was led as to whether a subpoena had been issued to procure the attendance of this witness. Without a subpoena there is no compulsion for Gobinathan to attend as a witness unless he was arrested for some other offence and brought to court. In any event the prosecution led no evidence that the address that SP6 went to was the last known address of the accused. It would have been a simple matter to have obtained the last known address of the accused from the National Registration Department and to have called an officer from the department to testify to Gobinathan's address. This was not done. Besides all this, the evidence of SP6 that Rajeswary, Gobinathan's sister told him that she did not know where Gobinathan was, is mere hearsay because Rajeswary was not called to testify as to what she had told SP6. This is all the more relevant since SP6 is the investigating officer of the case with an obvious self-interest in a successful conviction. Finally it is my view that advertising in the Harian Metro was indeed a wrong move because the advertisement should have been in a leading Tamil newspaper. I therefore held that there were no proper and diligent efforts made to procure the attendance of Gobinathan to court and rejected the prosecution's application to tender Gobinathan's statement under s. 32(1)(i) of the Evidence Act 1950.

The next prosecution witness was Izudin Hatta Abdullah (SP7). He testified that he was instructed by SP4 DSP Ramli to act as an agent provocateur in respect of this case. He was told that Det Sgt Richard Mahesan had received information that a male Indian called Siva was looking for customers to trade in heroin. He and Insp Chang Kut Choy were directed to proceed to a coffee shop at Jalan Tien Teik so that Det Sgt Richard could point out to them the suspect Siva. Both he and Insp Chang then proceeded to the said place where Det Sgt Richard pointed out to him the suspect, Siva. On the pretext of buying cigarettes he proceeded towards the counter so that he could better identify the suspect. He then telephoned DSP Ramli for instructions. He was told to wait for a phone call from the suspect. About an hour later he received a call on his hand-phone from a person who identified himself as Siva. SP7 gave his name as John from Ipoh. Siva then asked him if he wanted 'tepung putih' which he explained to be heroin in the language of traffickers. SP7 then told Siva that he had the intention of buying the same and to which Siva responded by enquiring if he had purchased the 'tepung putih' previously from anyone else.

SP7 replied that previously he had purchased the same from a Chinese in Butterworth but he had been unable to contact him since. Siva then enquired from SP7 at what price he had previously purchased the stuff. SP7 replied that he had paid RM5,300 for one pound of the same. However Siva told him that his stuff would cost more as his was of a better quality. When asked his price Siva said it was RM5,700. SP7 then asked for a reduced price and Siva agreed to a final figure of RM5,500. He was told by Siva that this price was for this occasion only and SP7 then told Siva that since the price was high, for the moment he would take four pounds only. To a question by SP7 Siva said that the colour of his stuff was 'putih kotor'. Siva assured him that his stuff was very good and that was why it cost more. When SP7 indicated that he wanted the stuff, latest that night, Siva promised to contact him after checking to see if he had the stock. SP7 then contacted DSP Ramli and informed him as to what had transpired. At about 4pm. Siva telephoned him and confirmed that he could supply the stuff that night. To a question from Siva if he was familiar with all the roads in Penang, SP7 replied that he was not. Siva then asked him from where he had previously received the stuff. When told that it was at the Juru Plaza Toll leading towards Butterworth Siva agreed to that rendezvous. Siva then directed SP7 to change the money into RM100 denomination and then gave his hand-phone number which was 012-4818005. Siva told him he would bring the stuff by 10pm. However Siva also indicated that he would telephone before that giving the code words 'line clear' meaning that the transaction would proceed as scheduled. SP7 then enquired if he ought to meet Siva first since he had never met him. Siva however said that it was not necessary as he would give SP7 the registration number of the car he would be using to go to the Plaza Toll, Juru. He then telephoned DSP Ramli and briefed him. He was then asked to go to a designated place by DSP Ramli for a briefing. On instructions SP7 then telephoned Siva at about 8.40pm to enquire if the line was clear or not. Siva told him that there was no problem and that the line was clear. Siva then told him that the car he would be arriving in was a white Proton Wira, No. PEL 3921. He also told SP7 not to telephone him again as he would be engaged in some work but he assured SP7 that he would meet him at 10pm. He then informed DSP Ramli of this and DSP Ramli then held a briefing.

At about 9.45pm SP7 together with the other policemen including DSP Ramli arrived at Plaza Toll Juru. He stood alone whilst the rest of the officers took up ambush positions near the public toilet at the Plaza Toll. At about 10pm Siva telephoned to say he would be a little late and requested SP7 to have the money ready as he did not wish to waste any time. Siva wanted the transaction in such a way that as he handed SP7 the package containing the heroin, SP7 must hand him the money. At 10.25pm. SP7 again telephoned Siva. Siva

sounded annoyed and told him "Jangan Dabbra! Ini bukan jual kacang putih. Ini kes tali gantung". (Dabbra is Penang colloquial for panic or worry). SP7 told him that he was worried holding so much money as he was afraid of being robbed. At 10.30pm. Siva arrived driving motor car PEL 3921. As SP7 stepped onto the road, Siva stopped the car, alighted and walked towards SP7. SP7 then identified himself as John from Ipoh and Siva too identified himself. On seeing another person in the car SP7 enquired as to who he was and was told that the passenger was his relative. Siva then apologised to him for not being able to produce the four pounds of 'putih kotor'. He was only able to get two pounds of 'putih kotor' and two pounds of a lesser quality heroin which was yellow in colour. When Siva asked for the money SP7 insisted on seeing the heroin first. Siva then opened the front passenger door and pointed to a white plastic bag at the foot of the passenger. When, SP7 insisted on examining the contents Siva demanded the money. It was at that point of time that SP7 arrested Siva and identified himself in a loud voice as the police. His fellow policemen who were in ambush rushed in and helped to detain the accused. He was then directed by DSP Ramli to leave the place and to return to the police station, which he did.

Under cross-examination he conceded that he had given a statement pursuant to s. 112 of the CPC and that it was his duty to state whatever transpired, whether he was asked on any particular issue or not, to the recording officer. He admitted that he did not state that his conversation with the suspect was *via* the hand-phone. He was not able to produce to the court his hand-phone bill which would have shown that he had indeed contacted the accused on that date. He also could not tell in whose name the hand-phone number 012-4818005 was registered under. Whilst admitting that in actual fact he did not have any money with him to conclude the transaction, he explained that he did not therefore arrest the accused immediately upon the accused showing him the plastic bag because DSP Ramli had instructed him to ensure that the accused actually brought heroin with him and not anything else. He denied counsel's suggestion that it was DSP Ramli and not he who had arrested the accused.

Det Sgt Richard Mahesan was the 8th witness for the prosecution. He testified that he had received information regarding the accused. He was directed by DSP Ramli to take SP7 to the coffee shop so that he could identify the suspect. With these witnesses the prosecution closed its case and offered 9 witnesses to the defence.

**Submissions Of No Case To Answer**

Mr Ranjit Singh commenced by saying that the prosecution had to prove a *prima facie* case against the accused and for this he relied on my earlier decision in *PP v. Tan Hock Beng* [2002] 3 CLJ 177 wherein I had held that:

> A *prima facie* case is one where every essential ingredient of the charge is established by sufficient, beyond reasonable doubt evidence and that such evidence can be overthrown by rebutting evidence of the defence sufficient to cause a reasonable doubt on the prosecution's case as to the guilt of the accused.

There are in my view numerous issues raised by the defence.

Firstly, counsel submitted that although SP7 had identified the target at the coffee shop yet there was no identification that the very same person arrested was the person whom he had seen at the coffee shop. This is not correct because just before counsel began his cross-examination of SP7, the learned deputy public prosecutor had asked and had established the fact that the accused was the same person whom SP7 had earlier seen at the coffee shop.

Secondly, counsel submitted that there was no record of any such telephone conversation between SP7 and Siva. Not only that SP7 had not been able to produce his telephone bills to show that at the material time and date, he had indeed been in contact with telephone No. 012-4818005, he had not even mentioned these telephone conversations to the investigating officer, SP6. SP6 agreed that he was handed two hand-phones but he did not know their telephone numbers nor did he know to whom the said two hand-phones belonged. To be fair to him he told counsel he did not investigate the ownership of the hand-phones because SP7 had not informed him of the importance of the telephone communications between himself and the accused. SP7 admitted that the only evidence regarding his telephone communication with the accused was his own self-supporting oral evidence and not even corroborated by his "112 statement". Since there was no re-examination on this issue Ranjit asked whether the receiver or caller could have been Gobinathan who has since absconded. Conversely counsel asked whether the alleged telephone conversation was a charade bearing in mind that SP6, the investigating officer, had admitted under cross-examination that he was investigating the case as based on information received and not on the basis of the existence of an agent provocateur. The court was therefore urged not to rely on the alleged telephone conversations as it was unsafe to do so.

The learned deputy public prosecutor submitted that the prosecution's case was on the basis of an agent provocateur being used. The learned deputy public

prosecutor pointed out that the agent provocateur had identified the accused at a coffee shop. He also referred to the various conversations between the accused and SP7 at the toll gate. The learned deputy public prosecutor pointed out to the conversation leading to the transaction and to the arrest.

Even if this court agrees with Mr Ranjit and rejects all conversations over the telephone, yet I cannot reject nor overlook the prosecution's evidence concerning the direct face to face conversation between the accused and SP7 at the Plaza Toll at Juru. The accused offered good grade and lower grade heroin for sale. Having reduced a little the price of the four pounds of heroin, the accused refused to reduce the price any further. When SP7 insisted on seeing the stuff first before releasing the money, the accused opened the left passenger door and pointed to the plastic bag containing the heroin. When SP7 insisted on ascertaining the contents of the plastic bag the accused demanded the money and he was arrested. On a final analysis even if I were to reject the evidence regarding the telephonic communications, which I do, since SP7 did not even tender to court his telephone bills linking tel no. 012-4818005 and also on the basis that there was no evidence that the accused owned the same telephone, yet I accept the evidence of SP7 with regard to what transpired between him and the accused at Plaza Toll, Juru, leading to the arrest of the accused. It is my judgement that just because the statement by SP7 made under s. 112 of the CPC did not mention the fact that he was an agent provocateur, it does not mean that the court cannot accept his evidence that he was such, more so when the supervising officer DSP Ramli himself had testified that SP7 was directed by him to act as the agent provocateur in this case. Mr Ranjit Singh very candidly conceded that his research did not reveal any authority on this point. Even though SP7 had agreed to the defence suggestion that he ought to reveal all details in his statement, whether he was asked or not, I am of the view that this is merely this witness's opinion.

Counsel next attacked the evidence regarding the arrest. According to SP7 he arrested the accused near the car when the latter had opened the front passenger door and had pointed out the plastic bag containing the money. When the accused insisted on the money being paid SP7 arrested him by shouting loud his identity as a police officer. However counsel pointed out that according to DSP Ramli's evidence when both SP7 and the accused were walking towards the accused's car, he, DSP Ramli shouted to arrest the accused. Counsel then referred to exh. D22 which is the police report lodged by DSP Ramli in which he had stated that when the driver alighted from the car he and his police party arrested both the male Indians In the car. It was Mr Ranjit's contention that there were three versions of the arrest. He referred to the case of *PP v. Lee Eng Kooi* [1993] 2 MLJ 322 wherein the court said at p. 333 as follows:

> If in a case the prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation.

I cannot see how the case of *Lee Eng Kooi* can help. In that case a police report lodged by a police officer disclosed that the three revolvers, the subject of the charge of possession of firearms and ammunition pursuant to s. 57(1)(a), (b) of the Internal Security Act 1960, were not found in a grey bag purportedly carried by the accused. The learned judge found that there was an acute and material contradiction as to where the revolvers were found. According to the said report the said revolvers were found in a black steel cylinder in the compound of the house. The learned judge therefore held that the accused was not, as alleged in the oral testimony of the witnesses, caught red-handed with the three revolvers but rather the said three revolvers were found outside the house inside the black steel cylinder. On this material and relevant contradiction, the learned judge made the said quote attributed to him.

In the case before me, I found no serious material contradictions. SP7 said he arrested the accused. SP4 said he shouted for the accused to be arrested. In the police report DSP Ramli is reported to have said when the accused alighted from the car, he and his police party arrested him. SP7 is a member of the said police party and he did say that as soon as he shouted out loud, his colleagues rushed towards the accused and assisted in the arrest. I find no serious contradictions as contended by the defence.

**Section 40A Of The Dangerous Drugs Act 1952**

The said section reads as follows:

> 40A. Evidence of agent provocateur admissible
>
> (1) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under this Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.
>
> (2) Notwithstanding any rule of law of the provisions of this Act or any other written law to the contrary, and that the agent provocateur is a police officer whatever his rank or any officer of customs, any statement, whether oral or in writing made to an agent provocateur by any person who subsequently is charged with an offence under this Act shall be admissible as evidence at his trial.

Mr Ranjit Singh argued that if the court were to rule that SP7 was not an agent provocateur then the prosecution could not avail itself of s. 40A(2). Notwithstanding the fact that SP6 the investigating officer had said that he did not know in the beginning that this was a case whereby an agent provocateur was used, it does not mean that an agent provocateur was not used.

In any case SP6 did say that later he knew that an agent provocateur was used. Whilst I agree with the views expressed by the defence that if it was a normal drug trafficking case whereby the accused is arrested based on information received and not upon the use of an agent provocateur, s. 40A could not be relied upon by the prosecution, I have held that SP7 was for all intents and purposes an agent provocateur.

**Break In The Chain Of Exhibits**

SP6, the investigating officer did not testify that he packed and sealed the exhibits in envelopes marked A, B and C before sending them to the chemist. However SP3 the chemist testified that he received three envelopes marked A, B and C containing the drugs. The question is, where did these envelopes come from? Who repacked them? Who sealed the envelopes? SP1 the police photographer testified that the said exhibits were taken out on 18 October 1998 to be photographed SP6, the investigating, officer said he received the exhibits from DSP Ramli on 17 October 1998 and kept them in his cabinet to which no one else other than him had access. Yet there was no explanation as to the packages, A, B, C tendered to the chemist. This is a chasmic void in the prosecution's case. How did the drugs get out of the safe cabinet of SP6 to be labelled as packages marked A, B and C. This gap in the prosecution's case is very serious and must be given sufficient consideration by the court. There is now clearly a doubt as to whether the exhibits actually sent to the chemist were the same exhibits that were said to have been safely secreted in the cloistered chambers of SP6's cabinet. In this respect it is appropriate to refer to *Teoh Hoe Chye v. PP; Yeap Teong Team* [1987] 1 CLJ 471 where the then Supreme Court also made a similar critical comment as to the absence of explanations as to what happened to the exhibits between the time they were handed to the investigating officer and to the time they were examined by the chemist.

SP4 DSP Ramli testified that on 16 October 1998 at about 10.50pm he arrested the accused and seized the exhibits. He then said that he handed over the exhibits to SP6 the investigating officer on 17 October 1998 at about 1.55am However SP6 said that he received the exhibits from DSP Ramli at 1.30am DSP Ramli did not explain as to where the exhibits were, or who had custody

of it from 10.50pm to the time he handed them to SP6. On this ground that there is a doubt as to the exhibits seized and considering the break in the chain of evidence, this court has to acquit the accused.

**Section 2 Of The Dangerous Drugs Act 1952**

The prosecution conceded that it was relying on s. 2 of the Dangerous Drugs Act 1952.

Section 2, the definition section defines "trafficking" as follows:

> 2. In this Act, unless the context otherwise requires:
>
> "trafficking" includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug;

Since the definition encompasses a wide range of conduct on the part of the trafficker, the prosecution chose to rely on "selling". In his submission the learned deputy public prosecutor specifically informed the court that the prosecution was not relying on being in custody or under the control of the drugs. In other words the prosecution had clearly opted not to rely on s. 37(d) of the Dangerous Drugs Act which reads as follows:

> 37(d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

Whilst he did not specifically refer to s. 37(da)(i) of the Dangerous Drugs Act, learned counsel in his submission referred to this section and submitted that the prosecution was also not relying on this section and the learned deputy public prosecutor did not deny this. Section 37(da)(i) reads as follows:

> 37(da) any person who is found in possession of
>
> (i) 15 grammes or more in weight of heroin;
>
> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

Since the prosecution chose to rely only on s. 2 and specifically that the accused was selling the drugs, I find that the offence of selling had not indeed been completed. What went on were negotiations. In fact the Federal Court in

*Chow Kok Keong v. PP* [1998] 2 CLJ 469 held that the meaning given in s. 2 of the Act to define "trafficking" is inapplicable as an alternate to or as a substitute for s. 37(da), in case of trafficking. The trial judge in *Chow Kok Keong* had relied heavily on an earlier Supreme Court decision of *Teh Geok Hock v. PP* [1989] 3 MLJ 162 which considered the effect of the word "trafficking" as in s. 2 of the Dangerous Drugs Act 1952 and wherein the court observed as follows at p. 163:

> The definition of "trafficking" in the Act is wide and includes not only buying and selling, but also carrying, concealing and keeping. It is totally different from the definition of the word "traffic" in the Singapore Misuse of Drugs Act. In the Singapore provision to "traffic" in a controlled drug so as to constitute an offence of trafficking involves something more than passive possession or self-administration of the drug.

The learned trial judge called upon the accused in *Teh*'s case to enter into his defence by invoking the provision under s. 37(da)(i) of the Act. His defence was that at the material time he was a drug addict, and a severe one at that and that the heroin found in his possession was for his own consumption. However in his admitted cautioned statement he had said that he had intended to sell the heroin. Therefore the Federal Court found the accused guilty based on the definition of trafficking which was wide and which encompassed many different acts all of which would show possession.

However the Federal Court in *Chow Kok Keong* declined to follow the decision in *Teh*'s case. On this point Edgar Joseph Jr FCJ said at p. 484-485 of the judgment as follows:

> The Judge, however, appears to have overlooked the later Supreme Court case of *Cohen Lorraine Philis & Anor v. PP* [1989] 3 MLJ 289, where the court (per Abdul Hamid LP) held that in a prosecution for trafficking in dangerous drugs, a defence of self-consumption might be available even where the quantity of drugs involved was in excess of the statutory minimum prescribed under s. 37(da) of the Act, but whether it could succeed would depend upon the particular circumstances of each case. And, in the subsequent case of *Ng Chai Kem v. PP* [1994] 2 CLJ 593, the Supreme Court followed *Cohen*.
>
> In our view, both *Cohen* and *Ng Chai Kem*, have severely watered down *Teh Geok Hock* in so far as it implies that passive, possession or self-administration can never be a defence to a charge of trafficking under s. 39(B) of our Act. Having considered this point afresh, we preferred the views expressed in *Cohen* and *Ng Chai Kem* to those in *Teh Geok Hock* which we regarded as over simplistic. We would add that apart from the general consideration that the drugs legislation is a piece of highly penal legislation and therefore any ambiguity in it should be resolved in favour of the subject, in accordance with

long established canons of construction, it is pertinent to note that the definition of "'trafficking" aforesaid comes under s. 2 of the Act, the very first line of which reads:

In this Act, unless the context otherwise requires.

In our view the context of s. 37(da)(i) which says:

any person who is found in possession of:

(i) 15 grammes or more in weight of heroin;

(ii) ...;

(iii) ...;

(iiia) ...;

(iv) ...;

(v) ...;

(va) ...;

(vi) ...;

(vii) ...;

(viii) ...;

(ix) ...; or

(x) ...;

otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

does *"otherwise require"* (emphasis added). If this were not so, the provisions of s. 37(da) which specifically confer upon the accused the right to rebut the presumption of trafficking arising from being found in possession of dangerous drugs in excess of the statutory minimum, would be an empty hypocrisy.

It is also pertinent to note that in the Federal Court case of *Syed Ali bin Syed Abdul Hamid & Anor v. PP* [1982] 1 MLJ 132, the court referred to the qualification provided in s. 2, that is, that the definition of terms listed thereunder are subject to the requirement of context. Consequently, the court held that if the context appears to have intended a different meaning from that appearing in the definition, the meaning given in s. 2, will not apply.

Furthermore, the part of s. 2 relied on by the prosecution in the case deals with "selling". This word in my view must be given, a strict interpretation. Whilst there was evidence of negotiations, there was no evidence of selling. In fact SP7 did not have the money to conclude a sale. The section does not provide for an offence of "attempting to sell" or "negotiating to sell". The offence is one of actual selling.

Taking into consideration all the evidence and the decisions of the Supreme Court on this issue and the abject failure of the prosecution to decline to rely on the presumption sections, there is no sufficient evidence for this court to call upon the defence based on the definition of s. 2 of the Act.

Finally, there was a passenger seated in front near whose feet the package of drugs was found. This passenger however was not offered to the defence. In this respect it is pertinent to record the observation of Lord Goddard CJ in *R v. Abbott* [1955] 2 All ER 899 CCA at 901 wherein his Lordship said:

> ... two sisters were indicted for murder, and there was evidence that they had both been in the room at the time the murder of the boy was committed; but the prosecution could not show that sister had committed the offence or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which, and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained that the prosecution should prove the case.

Having considered all the evidence I acquit and discharge the accused without calling for his defence on the offence as charged.